



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

ciate the extent of his true interest. His nature must be transformed. The latent capacities of his larger self must be evoked. Then new desires and tendencies will manifest themselves which find satisfaction only in the furtherance of the broadest human well-being. This development of character is accomplished by rigorous obedience to duty and continual self-sacrifice. In this way the hampering confines of a narrow self-interest, incident to an immature character, are broken down, and the individual finds that what he took for a foreign exaction is in reality a part of his own good and a condition of his own self-realization.

H. W. WRIGHT.

CORNELL UNIVERSITY.

THE ETHICS OF STATE INTERFERENCE IN THE DOMESTIC RELATIONS.

State interference in the domestic relations is expressed in laws and penalties concerning marriage, divorce, and remarriage. If two persons wish to marry, they may find that their marriage would be pronounced void by the State. If two married persons wish to become divorced, they may find that the law refuses to permit the separation. If two divorced persons wish to marry again, they may find a long delay necessary, or the way to remarriage closed. Most of the States of the Union require at least one year's residence in the State before divorce may be granted; many States require two years' residence; one State (Connecticut) requires three years' residence in some cases; and there are further requirements concerning causes, and the filing and publishing notice of suit, before divorce may be granted. The State of South Carolina allows no absolute divorce. Concerning remarriage after divorce, many States have restrictions and prohibitions. In Vermont, the defendant may not remarry within three years, unless with the plaintiff; in Maryland, the court may decree that the defendant shall not remarry during the lifetime of

the plaintiff; in South Dakota, the guilty party may never remarry, unless with the plaintiff; in the District of Columbia, only the innocent party may remarry.¹ The individual is thus hemmed about by the State with all manner of restraints, and there is even a growing tendency to increase this interference with the liberty of individual action.

The question naturally arises, Has the State a right to interfere in the domestic relations? It is often stoutly denied that the State has this right.

In the first place, it is held that State interference is only an enlargement of the unreasonable and unjust inclination in an individual to force other people to think and act as he does. It seems almost instinctive to desire that other men should act as one would like, and even to feel that they should be compelled so to act. The individual would impose his likes and dislikes upon all as the rule and law of conduct. In many people this disposition is restrained by nothing except lack of power; and when such people have the support of a number of others of like opinions and inclinations they do have the power and do attempt to enforce their views as rules of conduct for all. They would regulate every part of private conduct if it were possible to do so. They would exercise an absolute despotism over the individual who happens to dissent from them. But from the standpoint of liberty and equality, other people's opinions and preferences are as good and valid for them as his are for himself. A disposition which is not right in an individual is not right in a collection of individuals merely because they have power enough to enforce their views. Might does not make right, and this practice in society is no better than the condition of brutes where no law rules but that of the strongest.

Another argument against the State's interference is that of the anarchist. A man, he says, is to live wholly from within; no law can be sacred to him except that of his own nature; the only right is that which is after his own will; the only wrong is that which is against it. He is to bear himself in

¹ Hirsh, "Tabulated Digest of the Divorce Laws of the United States."

the presence of all opposition as if everything were trivial and ephemeral but himself; he is to be doctrine and law unto himself; he should be subject only to self-control, with those penalties and rewards only which come from his own nature. No external authority, constraint, or penalty should control him; he knows no law but himself, the unfolding of his own nature. Every form of external authority is bad, whether coming from another individual, or a ruler, or the collectivity of men, or God; all authority, legislation or restraint is an unjustifiable interference with his liberties and rights. In this wholesale denunciation of external interference, interference in domestic relations is, of course, included.

A third protest against State interference in the domestic relations is that of romantic sentimentalism. This view holds that love is the most intimate part of man's life, and therefore should be free from interference by other people. To exercise a censorship over this part of man's nature, to drag one's affections before the gaze and judgment of other people, is an impious profanation of sacred things. To attempt a surveillance of one's love, to supervise its workings, to bind it by the chains of custom, or to regulate its behavior according to the opinions and practices of the unfeeling herd, is shameless. The heart is the individual's sacred temple, and into its Holy of Holies none must penetrate save high priest and priestess.

A fourth aspect of the same reaction is represented by the Utopian view that man's attempted regulation in matters of love is an unwarranted bungling in affairs that are much better carried on by the race-spirit. The race-spirit is that mysterious natural force which secures the continuance and development and improvement of the race—a force operative in every living thing, sometimes driving it on to race-preservation even at the cost of individual extinction. What company of legislative Solons will arrogate to themselves this office? Visit any museum of natural history and study its specimens. Consider the wonderful variety of the birds, the marvelous richness and detail of plumage and coloring, and then say whether any legislation could have produced this perfection of develop-

ment! Would there not, on the contrary, have resulted a Puritanical severity of form and a monotonous black or gray? So, among men, let not a few fallible individuals attempt to direct and regulate the unfolding of human nature. Let the race-spirit work out the variety, richness, individuality, and perfection which it has in view for the future of the human race.

A fifth position is assumed by defining the function of the State as a police function, the maintenance of justice between individuals. This limitation of the State's authority is familiar through the teaching of Spencer and Mill,² although they did not apply it to the domestic relations. The State's right of interference with the individual's liberty of opinion and action, according to Mill, is for self-defense alone. So long as the individual abstains from injuring the interests of others, he should remain unmolested. So long as the individual's acts affect only himself, or affect others only with their free consent, the State has no right to interfere. No other individual, no group or collection of individuals, no State, has the right to compel the individual to act or to refrain from acting on the ground that it is for his good, or that it would be prudent for him to do it, or that it would be wise or even morally right for him to do it. These are good reasons for remonstrating, advising, instructing, persuading, but not for compelling. In all that realm of thought and action which affects only himself, the individual is the final judge. He is to have perfect freedom in conscience, entertaining and professing whatever opinions he may please, and perfect freedom in action, carrying his opinions out into practice, living according to his own tastes and likings, so long as the interests of other people are not injured by him; and he is to have perfect freedom to unite with others of like mind, the liberty of combination. No other individual, no collection of individuals, not even all other individuals, have the right to interfere with him any more than he would have the right to interfere with them if he had the power. Such interference is an assump-

² See Mill, "On Liberty," and Spencer, "Man *versus* the State."

tion of infallibility. But the individual understands his circumstances better than any one else. His life is his own to live according to his nature. Different people have different characters, and require different conditions for their development. One's parentage is different from that of other people, one's training has been different. His life is his own, and he has a perfect right to live it according to his own nature, so long as he does not interfere with the like liberty of other people. A person's own character, not the traditions and customs of other people, should be the rule of his conduct. A human being has better faculties than the ape-like faculty of imitation. Free scope should be given to varieties of character. The State has the right to regulate only that part of the individual's life which concerns other people. It is only when definite damage or definite risk of damage ensues to the interests of others that the State has the right to interfere with the individual's liberty of action. The State's sole duty and right is to be the guardian of liberty. It is held by many (though not so by Mill and Spencer themselves) that marriage, divorce, and other domestic relations belong to that class of relations which concern only the consenting parties, and that the State is violating its legitimate authority when it interferes in these matters.

Such are the arguments which deny the State's right to interfere in the domestic relations. Is there anything to be said in reply? Must we conclude that this interference by the State is unjustifiable, or may we still find sufficient grounds to justify it?

In the first place, even if the function of the State be restricted to the maintenance of justice, to the exclusion of benevolence, fraternity, or love, there is still something to be said in justification of the State's interference in the domestic relations. Marriage, divorce, and remarriage are not subjects which have no concern with the public good. Domestic relations touch society at many and vital points, and if the State did not interfere with and regulate these matters, the State would be permitting a crime against the other members of society. Thus, for example, the domestic relations affect the

State in the matter of property. In buying, selling, or mortgaging, in paying taxes, in bequeathing or inheriting, there is often the question of the rights of husband and wife, of children, or of heirs. That family relations are closely connected with property is attested by the attitude of most scientific socialists. They hold that the greatest barrier against the advance of socialism in property is the institution of the family. The family and private property are, in their judgment, so intimately related that property cannot be socialized until the institution of the family is socialized also. Again, marriage, divorce, and the other domestic relations concern society through the children, who are to become future competitors in the economic struggles, future citizens of the State, and factors in all the affairs of social life and activity. Obligations arise on the part of the uniting parties toward these third persons, the fulfilment of which obligations, and the mode of fulfilment, must be a concern to the State. Bringing into existence a human being is one of the most responsible acts of human life; and to hold that the exercise of this responsibility is the concern of no one but the persons uniting is unwarrantable. A life which may be a blessing or curse to itself and to society is something of which society may reasonably take account. Society has the right to insist that the interests of this life be regarded, or society is an accomplice in the crime against that life. Society may demand reasonable assurance that this life shall have proper chances of livelihood, that it shall not be thrown upon society a pauper and grow up to be ignorant or criminal, that it shall not be afflicted with frightful disease and become a curse to itself and a menace to others.

Domestic relations, then, concern not only the individual or other freely consenting individuals, but society at large. Society must protect the rights of these future citizens and must protect itself against injury through them. There is thus a double duty of the State to interfere in domestic relation—as regards children on one hand, and as regards other members of society on the other. It is within the just limits of State action to erect safeguards against mischief and injury

to its present and future citizens through the procreation of children.

Society has the right and the duty of restricting the marriage or cohabitation of idiots, weak-minded, insane, epileptics, criminals, habitual drunkards, the scrofulous, the tuberculous, and the venereal-diseased, whose progeny may inherit criminality, defects and diseases dangerous and burdensome to society. The social cost of crime, the enormous burden and the terrible danger to society, demonstrate the importance of State regulation of the domestic relations. Mr. Eugene Smith, in a paper read before the Annual Congress of the National Prison Association in 1900, discussing statistics from city, county, and State budgets concerning taxation chargeable to crime—the share of the public expenses connected with maintaining the police, the courts, the fees of witnesses, jurors, and counsels, the prisons, the district attorney's office, and the sheriff's office—was led to estimate the rate of crime taxation in the United States as at least \$3.50 *per capita* in the cities and \$1.00 *per capita* in the country, or a total of \$200,000,000 each year. "It greatly exceeds in amount every other object of public expenditure, except only that of our military establishment in time of war. The item that most nearly approaches it is the cost of public education, the expenditures for which throughout the whole United States amounted, according to the census of 1890, to \$139,000,000. But vast and oppressive as is this burden of taxation, it represents an outlay in *prevention* only of crime."³ It is no complete measure of the damage caused by crime. To this must be added the losses sustained through theft, forgery, burglary, arson, and similar crimes. From statistics concerning the number of convicts in the United States, Mr. Smith estimates it as conservative to conclude that there are 250,000 habitual criminals in the United States, and that on an average each of these preys upon society to an amount of \$1,600 a year. This gives an annual sum of \$400,000,000 to be added to the yearly taxa-

³ "Proceedings of the Annual Congress of the National Prison Association," 1900, pp. 318, 319.

tion caused by crime, an amount exceeding the value of the entire cotton crop or the entire wheat crop of the United States. But this also represents but *part* of the cost of crime. Locks, bars, bolts, safes, burglar alarms, weapons, and the numerous other means of social defense must be added as items of cost; and finally, who can estimate the value of the more than ten thousand lives lost each year in the United States through murder, or the amount of suffering, agony, ruined homes, and despair resulting from crime, and the constant terror in which all the people live?

How, then, can it be maintained that domestic relations are not matters of concern to others when the consequences of these relations may involve wretchedness and depravity to offspring and manifold evils to the other members of society? The State must become more keenly sensitive to the duty of regulating the marriage relation. By increasing the reproduction of the fit, and by decreasing or stopping the reproduction of the unfit, society may be coworkers with the "race-spirit," taking part in the selective improvement of the human stock, adding to "natural selection" the human or rational selection.

The foregoing considerations alone might be claimed sufficient to justify the State in its so-called interference, or the maintaining of supervision and control over the domestic relations; and they are valid without reference to whether the two contracting parties are "freely consenting," or "exercising equally their rights." It must, however, be further remarked that it often happens that the two parties are not exercising equally their liberty. One or the other party may be injured, and needs to be protected by society. It is the concern of the State to see that justice is done. When a person has encouraged another to rely upon his continuing to act in a certain way, to build expectations, and stake any part of his or her life and interests upon that supposition, a set of obligations arises on his part toward that other person which it is the concern of the State to see fulfilled. The State, as the guardian of the liberties of all, must see to it when contracts

are made and while they are being carried out, that justice to all parties concerned is done.

The foregoing counter-arguments are based on the concession that the State's action is to extend no farther than social defense, and is not to cover the sphere of social betterment, to insure justice, but not to promote benevolence. If to this negative function of securing to the individual the opportunity of self-realization by protecting him from the encroachment of other individuals, there be added the positive function of providing and improving the conditions of the ethical life of each of its citizens, State interference may be defended by additional arguments.

There remains to be considered the underlying ethical principle involved in State interference, or the principle by which justice is determined. Justice denotes a relation between persons. What principle directs us in determining a just relation? In concrete terms, suppose the person interfered with by the State demands a reason for the interference—suppose he asks, "Why are you interfering?"—what answer is to be given? Man is a reasonable being and has a right to demand reasons for the State's interference with his liberty.

This fundamental principle, it may be first of all suggested, is the sanction of religion. Most religions deal with the questions of marriage, divorce, and the other domestic relations, with express teachings, commandments, and prohibitions; and the opinion is fairly current that these questions are settled by assigning as a reason, "Such is the teaching of the word of God." May, then, the State's interference in these matters be rightfully based upon a religious creed or theological code?

Mill, in his chapter on "The Liberty of Thought and Discussion,"⁴ has furnished a sufficient answer to this question. A religious creed may be accepted by an individual as the rule and guide of his belief and practice. He may consider its precepts binding upon his conscience; and he may rightly search for its teachings on all questions and regulate his life in accordance with those teachings. But he has not the social

⁴ Mill, "On Liberty," ch. II, pp. 33-99.

right to force his views upon others who may entertain different views. Conscience is a sacred part of the individual's liberty. In the case of religious belief, the claim of some individual or of the whole of society to exercise authority over a person who dissents is to be denounced as a violation of social right; and no human being is to be held accountable to other human beings for his religious belief. This position has been won in the world through long and sad experience. It is now generally recognized and asserted as a principle, but in practice, religious freedom is hard to realize. Intolerance seems natural to men in those things for which they most care. But it must be vigorously asserted that the State shall place no restrictions on conduct on the ground that such conduct is religiously wrong. The notion that it is one man's duty that another should be religious, and that the first fulfills his duty in compelling the second to be religious, is the foundation of religious persecution. The spirit of persecution is the determination not to tolerate others doing what is not permitted by the persecutors' religion. The persecutors believe that God not only abominates the act of the misbeliever, but will hold the persecutors guilty if they do not persecute the misbeliever. History abounds with society's mistakes along this line. Socrates, who is now regarded as the most virtuous man in his age and the model of all subsequent teachers of virtue, was put to death on the charge of impiety and immorality—impiety in denying the gods of the State, and immorality in his teachings to the young men of the State. Jesus was put to death on the charge of blasphemy, and regarded as the personification of impiety. The Inquisition persecuted and put to death on religious and theological grounds thousands of good persons. Evil results have always come from attempting to conduct a theocracy on earth. Neither the State nor its officers hold a commission from on high to avenge supposed offenses against the divine. The old Latin proverb that "Injuries to the gods are the care of the gods" should restrain us from attempting to be their avengers. To base the State upon a religious creed means the exaltation of a priestly class who must be accounted the vicegerents of the

Most High; it means the impossibility of experiments in government and the correction of mistakes through experience; it means the deterioration of the individual's powers—he is deprived of self-government and made the slave of a despot. Even where there is not the identifying of church and State, great evils to society may result from regulating the State by a religious code. The English law prohibiting a man's marrying the sister of his deceased wife, a law based on the Canon Law in the Old Testament, has caused much distress, and has recently been repealed, to the discomfort of the Church of England.

If we hold, then, that State interference and regulation in these matters is not to be based upon the religious creed which happens to be received by the majority of the people or the persons in power, upon what shall we say that it is based? May we not hold that it is based upon social well-being? The collective well-being is the proper aim for the collectivity; and just as in the individual's life it is impossible to have all the desires satisfied at the same time, so in the social body it is impossible to have all the desires of all the individuals satisfied at the same time. The social condition is an unalterable fact of man's existence. Men are constrained to live with one another. The sphere of one man's activity cuts necessarily into the spheres of activity of other men; and there is necessary an adjustment between the individual and society. The freedom of each is necessarily limited by the like freedom of others. The world does not afford room for the unrestrained activity of the individuals. Right or justice affirms that every man may claim the fullest liberty compatible with the possession of like liberty by every other man. The State is to secure this. The common good lies in bringing about such a condition of society that each member shall have full scope for realizing himself without diminishing other men's spheres of activity. The common good is in securing the largest amount of collective freedom with the least individual restraint. That organization of society should be sought which will make possible the full development and expression of human nature, the perfect realization of human capacities and possibilities.

This is the aim that society should have in view in its collective activity, and this principle of social well-being may be given as the ground for interference with the liberty of action of any member of society. On this basis society has a reasonable justification to offer to the individual. This interference is necessary for the social well-being—the well-being of the individual himself and of all other individuals. The State exists not for one, not for a few, not for the majority, but for all. The true function of the State is to secure the fulfilment of the personal life of its citizens. The State is the vehicle by which the citizens attain to their full personal development. The State does not “interfere”; the State intervenes to protect the person and maintain the possibility for unhindered development of personality, by seeing that no individual encroaches upon other individuals, but that all have full opportunity of ethical self-realization. The principle of State action should be this: To secure such an organization of society that in it all persons may have full opportunity to live their largest lives.

RAY MADDING McCONNELL.

HARVARD UNIVERSITY.